IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2837 OF 2005

Smt. Taramati Bhagwandas Vithlani ..Petitioner
Vs.
Navjivan Gulab Gaikwad & Ors. ..Respondents.

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Mr. R.D. Misra for the Petitioner.
Mr. D.S. Sawant for Respondent No.1.

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CORAM: DR. D.Y. CHANDRACHUD, J.

7th June, 2006.

ORAL ORDER :

1. Rule, made returnable forthwith. Counsel appearing for Respondent No.1 waives service. By consent taken up for hearing and final disposal.

2. The Petitioner is the owner of an immovable property by the name of Taramati Bhagwandas Vithlani Chawl situated at S.M. Marg, Kurla (West), Mumbai. The First Respondent was the tenant of the Petitioner in respect of a room bearing Room No.238. A suit for eviction was instituted against the First Respondent on the ground of unlawful subletting, change of user and nuisance. It is an undisputed fact that the writ of summons was served on the

First Respondent. It is equally undisputed that several adjournments were sought on behalf of the First Respondent for filing a written statement and time was granted by the Learned Trial Judge. No written statement was filed. The suit was decreed by the Small Causes Court on 23rd October, 2002. A notice before execution of the decree was taken out and was served on the First Respondent on 7th April, 2003 and possession was handed over to the Petitioner. On 21st April, 2003 the Petitioner moved an application for setting aside the ex parte decree. The application admittedly was beyond the period of limitation prescribed under Article 123 of the Schedule to the Limitation Act, 1963.

3. The Learned Trial Judge dismissed the application by a judgment and order dated 11th February, 2004. An appeal was preferred before the Appellate Bench of the Court of Small Causes which was allowed by an order dated 24th March, 2005 and the Petitioner was directed to restore possession to the First Respondent.

4. In these proceedings notice was issued on 3rd May, 2005 and the order of the Appellate Bench was stayed. This Court

directed on 14th February, 2006 that the matter be heard finally at the stage of admission. Parties have accordingly addressed the Court for hearing and disposal at this stage. Rule is accordingly issued and the matter is taken up by consent for hearing and final disposal.

5. The entire case of the Petitioner for the setting aside of the ex parte decree was that the Petitioner had engaged an advocate by the name of Mr. Shinde to whom the papers had been entrusted. The Petitioner claimed that he had faith in the advocate and he had met the advocate on 4 to 5 occasions in 2002 when he was assured that the matter was being taken care of and the Petitioner would be informed when his presence was required.

6. The decree in the present case was passed on 23rd October, 2002. Under Article 123 of the Schedule to the Limitation Act, 1963 an application to set aside a decree passed ex parte has to be filed within a period of 30 days. Time begins to run from the date of the decree or, when the summons or notice was not duly served, when the applicant had knowledge of the decree. In the present case, admittedly, the writ of summons was duly served and

therefore time began to run from the date of the decree which is 23rd October, 2002.

7. Courts are undoubtedly liberal in matters of condonation of delay and particularly when a party claims that an advocate has been negligent in pursuing the proceedings. The judgment of the Supreme Court in **Rafiq v. Munshilal** (AIR 1981 SC 1400) is an authority for the proposition that a party should not be made to suffer for the inaction, deliberate omission or misdemeanour of his agent. In a subsequent decision in **Salil Dutta v. T.M. & M. C. Private Ltd**. (JT 1993 (4) SC 528), the Supreme Court while construing the earlier judgment has observed as follows :

> "The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition."

8. The Learned Trial Judge in the present case observed that in support of the application for setting aside the ex parte decree, a positively false statement was made on behalf of the First Respondent herein. In order to appreciate this finding, it would be appropriate to advert to certain statements made in the application moved on behalf of the First Respondent, (Misc. Notice 396 of 2003) before the Trial Court. In paragraph 5 of the application, the following statement was made :

> "The date of the passing of the Decree has come to my knowledge through my present Advocate, when he took the inspection of the papers in this Hon. Court. It has been seen that the Notice before Execution has also been issued, when the Decree was passed on 23.10.2002. I was not served with any such Notice before execution, and as such I was in complete darkness about the happenings in the present Suit."

Then again in paragraph 9, it was averred as follows :

> "I say that I came to know about the passing of the Ex-parte Decree against me when the Plaintiff came to execute the Decree on 7.4.2003. Till that time, I was under the bonafide belief that the suit is still pending and my previous Advocate is taking care of the same."

9. The learned Trial Judge noted that the report of the Bailiff showed that the notice before execution of the decree was in fact served on the First Respondent on 3rd February, 2003. Therefore, the statement that the First Respondent was not served with the notice before execution of the decree which was made in paragraph 5 of the affidavit in support of the application was unfounded and false. Similarly, the statement that the First Respondent obtained knowledge of the ex parte decree only on 7th April, 2003 when the Plaintiffs came to execute the decree is falsified by the circumstance that notice before execution had already been served upon the First Respondent two months prior thereto on 3rd February, 2003. The judgment of the Appellate Bench does take note of this, since the Appellate Bench has observed as follows in paragraph 20 of its judgment :

> "No doubt after passing ex-parte decree on 23.10.2002 notice before execution bearing Misc. Notice No.85 of 2003 was taken out by the Plaintiff. Bailiff report shows that, the notice of the said proceedings was duly served upon all the Defendants including Defendant No.1. Defendant No.1 however did not appear before the Court. Defendant No.1 has denied that, he was duly served with the notice and has denied that Learned Judge of the Trial Court has held that, the contentions raised by the Defendant No.1 are false and as such Defendant No.1 does not deserve sympathy. He has

> also observed that, though the warrant of possession was executed on behalf of the Defendant No.1, the Defendant No.1 denied the same. That is another falsehood observed by the Learned Trial Judge and as such the notice came to be discharged."

10. Despite a clear cut observation in regard to the falsity of the statement made by the First Respondent, the Appellate Bench proceeded to set aside the ex parte decree. Courts are undoubtedly liberal in ensuring that a party is not prevented from a fair opportunity to pursue proceedings before the Court whether as a plaintiff or as a defendant. An ex parte decree has the effect of precluding the defendant from having his defence considered before the Court and when a plausible reason is placed before the Court, the Court would undoubtedly consider it sympathetically having regard to the decision in **Rafiq** (supra). However, as the Supreme Court noted in its subsequent decision in **Salil Dutta**, the principle in **Rafiq**'s case is not absolute. The Court must weigh the conduct of the party and the nature of the explanation. A party cannot be allowed to benefit from a false defence.

11. In the present case, there is merit in the contention of counsel appearing for the Petitioner that both the Courts below

having found that a material part of the statement in the affidavit of the First Respondent was false, it was manifestly inappropriate for the Appellate Bench of the Small Causes Court to interfere. The statement that the First Respondent was not served with the notice before execution and that he had no knowledge of the passing of the ex parte decree until 7th April, 2003 is palpably untrue. This would cast a serious doubt on the veracity of the explanation that the First Respondent has blindly trusted his advocate even during the pendency of the suit. This, it may be noted is not a case where the litigant was a villager situated outside the head quarters of the Court which exercised jurisdiction, but a party who resides in the very same city where both the Court and his advocate are situated. In such a case, the intervention of the Court at the behest of a party who has come before the Court with a positively false statement on affidavit is totally uncalled for. In such matters Courts must be vigilant to ensure that the liberal approach of the Court is not abused by a party who has set up a false case.

12. The exercise of the supervisory jurisdiction is called for under Article 227 in the facts of this case. The Appellate Bench of

the Small Causes Court has committed a manifest error on the face of the record by exercising its jurisdiction in the face of a false statement made by the First Respondent. Unless this Court were to interfere, there will be a manifest failure of justice.

13. In the circumstances, this Petition has to be allowed and is accordingly allowed. The impugned order of the Appellate Bench of the Small Causes Court dated 24th March, 2005 is quashed and set aside. Misc. Notice 396 of 2003 shall in the circumstances stand dismissed.